

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CITY OF STERLING HEIGHTS,

Plaintiff-Appellee,

v

CHARLES BLEDSOE, d/b/a AFTER DARK,

Defendant-Appellant.

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UNPUBLISHED

January 24, 2003

No. 237692

Macomb Circuit Court

LC No. 01-001209-CE

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment in favor of plaintiff and a prior order denying his motion to set aside a default. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1999 defendant opened After Dark, a teenage dance club. The club charged a single admission fee, and offered free snack foods and non-alcoholic beverages. In 2001 plaintiff notified defendant that his club violated a zoning ordinance that prohibited "discotheques." On March 20, 2001 plaintiff filed a complaint alleging that defendant's club was not used primarily as an eating and drinking establishment but rather as a dance hall, and that because it violated the zoning ordinance it was a nuisance per se. Plaintiff sought to enjoin defendant from operating his club as a dance hall. Defendant did not answer the complaint and was defaulted.

The trial court granted defendant's motion to set aside the default. Defendant filed an answer in which he denied that his club violated the zoning ordinance and alleged that plaintiff was estopped from asserting improper use because plaintiff issued all necessary permits for the club and allowed it to operate for two years before raising objections.

On June 5, 2001 plaintiff filed a first amended complaint alleging nuisance per se and fraud. The complaint alleged that although defendant's application stated that while the proposed use of the establishment would be as a coffee, juice bar, and grill, the establishment actually operated as a teenage dance club. Defendant failed to answer the amended complaint within twenty-one days, MCR 2.108(C)(3), and on July 2, 2001 was defaulted. On July 9, 2001 defendant moved to set aside the default. He alleged that the amended complaint was not properly served, and that any default would be effective only as to the added count of fraud. Defendant also filed a motion for declaratory judgment and answered the amended complaint. In a supplement to his motion to set aside the default defendant acknowledged that the amended

complaint was properly filed and served, but continued to argue that the default applied only to the count of fraud. He also asserted that the default should be set aside due to excusable neglect and to avoid manifest injustice. Defendant contended that the failure to answer the complaint in a timely fashion was due to his counsel's involvement in a complex trial, and that his filing of an answer and a motion for declaratory relief demonstrated that he was actively defending the case.

The trial court denied defendant's motion to set aside the default. The court held that because defendant neither filed a timely pleading in response to the amended complaint nor filed a notice indicating that his answer to the original complaint stood as the answer to the amended complaint, MCR 2.118(B), the default applied to all allegations in the amended complaint. The court rejected defendant's assertion that his counsel's heavy workload excused the failure to file a timely answer, noting that a lawyer's caseload and work schedule did not constitute good cause for failure to answer a complaint. Finally, the court found defendant's assertion that plaintiff was estopped from enforcing the zoning ordinance to be without merit.

The trial court distinguished the instant case from *Pittsfield Twp v Malcolm*, 375 Mich 135; 134 NW2d 166 (1965), in which our Supreme Court affirmed the trial court's judgment and held that the plaintiff was estopped from enforcing a zoning ordinance against the defendant. The *Pittsfield Twp* Court noted that the defendant secured all necessary permits for the construction and operation of an animal kennel, constructed a new building which could only be used as an animal kennel, and otherwise acted in such a manner that gave the plaintiff notice of the building's intended use. The *Pittsfield Twp* Court held that these extraordinary circumstances militated against the general rule that municipalities could not be estopped from enforcing zoning ordinances. *Id.* at 144-149.

Here, the court noted that defendant did not build the building in which the club was located and did not erect outdoor signage that would give notice of the proposed use of the building. Moreover, the court found that the club's manner of operation (being open only on Friday and Saturday nights, the presence of a disc jockey, and the serving of only snack foods) indicated that the club's primary use was as a dance hall rather than a dining establishment. The court found that the circumstances were not sufficiently extraordinary to warrant an exception to the general principle that municipalities cannot be estopped from enforcing zoning ordinances. The court concluded that defendant did not have a meritorious defense that would warrant setting aside the default.

Defendant moved for reconsideration. The trial court denied the motion. In the final judgment the trial court found that defendant's club violated plaintiff's zoning ordinance and constituted a nuisance per se. The judgment enjoined defendant from operating the establishment as a dance club.

A motion to set aside a default or a default judgment should be granted only if the movant shows good cause and files an affidavit of meritorious defense. MCR 2.603(D)(1). Good cause consists of: (1) a procedural defect or irregularity; or (2) a reasonable excuse for the failure to comply with the requirements that created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). Manifest injustice is not a discrete occurrence that can be assessed independently. *Id.* It is the result that would occur if a default were allowed to stand after a party has demonstrated good cause and a meritorious defense. *Id.* If a party puts forth a meritorious defense and then attempts to establish good cause by showing

a procedural defect or a reasonable excuse for failure to comply with the requirements that led to the default, the strength of the defense will affect the showing of good cause that is necessary. *Id.* If a party states a meritorious defense that would be absolute if proven, a lesser showing of good cause is required to prevent manifest injustice. *Id.* at 233-234. The decision to grant or deny a motion to set aside a default or a default judgment is within the discretion of the trial court. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). However, we review a trial court's findings of fact in an equitable matter for clear error, and review the ultimate decision de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

Defendant argues that the trial court abused its discretion by denying his motion to set aside the default. We disagree and affirm the final judgment and the trial court's order denying defendant's motion to set aside the default. Defendant's answer to the amended complaint and motion for declaratory relief were filed after the default was entered, and thus did not demonstrate that defendant was defending the case in a timely fashion. MCR 2.603(A)(1). Defendant failed to show good cause to set aside the default. Defendant neither filed an answer to the amended complaint in a timely fashion, nor filed a notice that his answer to the original complaint stood as the answer to the amended complaint, as required by MCR 2.118(B). Another panel of this Court has held that just as an amended complaint supersedes the original complaint, MCR 2.118(A)(4), an amended answer supersedes a previous filed answer. *Grzesick v Cepela*, 237 Mich App 554, 562-563; 603 NW2d 809 (1999). Therefore, an amended affirmative defense must be expressly asserted or incorporated by reference into an amended pleading in order to be properly preserved. *Id.* Defendant did not comply with MCR 2.118(B); thus, his answer to the original complaint was no longer valid after plaintiff filed the amended complaint. *Id.*

The trial court correctly concluded that the default applied to the entirety of the amended complaint. The trial court also correctly concluded that defendant's counsel's busy schedule did not excuse the failure to timely file an answer to the amended complaint. See *Daugherty v State (After Remand)*, 133 Mich App 593, 598; 350 NW2d 291 (1984). Finally, the trial court properly concluded that the circumstances presented by this case failed to warrant application of an exception to the general rule that municipalities cannot be estopped from enforcing their voting ordinances. *Pittsfield Twp, supra*.

Defendant disagrees with the trial court's conclusion, but has not shown that that conclusion was based on clearly erroneous findings of fact. *Killips, supra*. Defendant failed to demonstrate good cause to set aside the default and the existence of a meritorious defense. MCR 2.603(D)(1). The trial court did not abuse its discretion by denying defendant's motion to set aside the default. *Alken-Ziegler, supra*; *Park, supra*.

We affirm.

/s/ Jessica R. Cooper  
/s/ Richard A. Bandstra  
/s/ Michael J. Talbot